

DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
941 North Capitol Street, NE Suite 9100
Washington, DC 20002

DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND
REGULATORY AFFAIRS

Petitioner,

v.

BORGER MANAGEMENT INC.
Respondent

Case No.: CR-I-06-N100591

FINAL ORDER

This case involves a Notice of Infraction served on Respondent Borger Management on June 1, 2006 alleging two violations of D.C. Official Code § 47-2851.02 for operating elevators without a business license.¹ The violations were alleged to have occurred on February 3, 2006 at 1250 U Street N.W. (the “Property”) The Government sought fines of \$2,000 for each violation for a total of \$4,000.

Respondent denied the violations, and a hearing was set for August 2, 2006. At the hearing convened on that date, Geraldine Owens appeared for the Government, presenting the Government’s case based on pre-hearing consultation with the charging inspector, Audrick

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D.C. Official Code § 47-2851.02 provides in relevant part:

(a) A person which is required under law to obtain a license issued in the form of an endorsement to engage in a business in the District of Columbia shall not engage in such business in the District of Columbia without having first obtained a basic business license and any necessary endorsements in accordance with this subchapter.

(b) A license shall be required for each business location.

Payne. Respondent was represented by Timothy Taylor, a property manager with Borger Management. At the opening of the hearing, after the nature of the available pleas was explained, Respondent changed its plea to Admit with Explanation.

The threshold issue this case presents is whether Respondent, who does not sell or service elevators, is required to have a business license to engage in the elevator business solely because it manages a building with elevators used to transport passengers from floor to floor.²

Accordingly, based upon the entire record in this matter, I hereby make the following findings of fact and conclusions of law:

II. Findings of Fact

Respondent manages a multi-story building at 1250 U Street, N.W. which has two elevators. The building, which is leased to the District of Columbia, is approximately three years old. The electrical inspections required before a certificate of occupancy can be issued were conducted in 2003 before the building was placed in service. Respondent's Exhibit ("RX") 204.

On February 3, 2006, Inspector Payne inspected the elevators in the building. He issued a "Notice of Violation and Notice to Abate", which cited several items relating to testing and operation of the elevators, which were alleged to violate the provisions of either ASME A17.1, a Safety Code for Elevators and Escalators developed by the American Society of Mechanical

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The Government was afforded the opportunity to file a brief on this issue. On August 17, 2006, the Government requested an extension to file its brief, but to date, has not filed a brief on this issue.

Engineers³ or the National Electrical Code. Respondent remedied those conditions at a cost of approximately \$8,000.

As a result of the same inspection, Inspector Payne also cited Respondent for violations because it did not have business licenses for its elevators. The Notices of Infraction alleging that Respondent lacked business licenses for the elevators is the sole issue in this proceeding.

Respondent does not sell, service or install elevators. The elevators at the Property are used to transport building occupants and guests to upper floors as an alternative to stairs. There is no evidence that Respondent charges passengers a fee for use of the elevators or that the elevators generate a separate revenue stream.

The Department of Consumer and Regulatory Affairs (DCRA) Business License Center issued a document with an “Inspected Sales and Service” endorsement for a commercial elevator for each of the elevators at the Property for license period February 4, 2004 through March 30, 2005. This licensing period expired before February 3, 2006, the date of the violation charged in this case. RX 200-201.

After the violation charged in this case, Respondent obtained a document from DCRA’s Business License Center for the license period March 1, 2006. through February 29, 2008 for each of the elevators which also has an “Inspected Sales and Service” endorsement for commercial elevators. This document is identical to the document previously issued to Respondent in 2004 except that it is entitled “Basic Business License” instead of “Certificate of

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Many national and international building and construction codes have been adopted by the Council of the District of Columbia, making them enforceable in this jurisdiction. See 51 D.C. Reg 292 (January 9, 2004) ASME A17.1, developed by the American Society of Mechanical Engineers has not been adopted. Until adopted, it does not have the force of law in this jurisdiction.

Inspection”.

By its answer and plea of Admit with Explanation, Respondent has admitted the violations charged in the Notice of Infraction.

III. Explanation of the Charges

The municipal regulations of the District of Columbia contain extensive requirements to insure the safety of elevators. These regulations, which are more than a hundred pages in length, contain detailed requirements on the design, construction, maintenance, inspection and testing of elevators.⁴ They include requirements that building owners and operators pay an annual inspection fee for a certificate of operation and prohibit the operation of any elevator that has not been granted such a certificate. Such certificates must be hung conspicuously in each elevator and are the certificates that are typically displayed in elevators.⁵ At the hearing, the Government

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These regulations, called the Elevator code, appear in Title 13A of the District of Columbia Municipal Regulations. The regulation on certificates of operation appears at 13A DCMR 107.

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An elevator certificate is a “certificate of operation” governed by the elevator code, 13A DCMR 107, which states in pertinent part as follows:

107.1 Certificates issued for the operation of elevator units shall terminate each year at midnight on June 30th.

107.2 It shall be unlawful to operate any elevator unit subject to this Code unless the annual certificate authorizing the operation of that elevator has been issued in accordance with the provisions of § 106.7 and this section.

107.3 Every day of operation after the expiration date of a certificate shall be unlawful operation and shall constitute a separate offense subject to the penalties prescribed in § 102.

107.4 If the renewal of a certificate of operation has not been paid for by the 10th day of July following the expiration date, each elevator unit shall be sealed out of service by the Director.

107.5 Each certificate of operation shall be placed under glass, framed, and hung in a

acknowledged that a certificate of operation is a separate requirement from the provision it is seeking to enforce in this case. Thus, there is no allegation in this case that Respondent's elevators lacked a certificate of operation, or failed to comply with any safety regulation or provision of the elevator code.

Rather, Respondent has been charged with a violation of the business licensing law which covers a broad array of businesses. Under the business licensing law, a license in the form of an endorsement must be obtained when a license is required by law to engage in business. There are more than twenty license endorsement categories and the types of establishments that fall within each license endorsement category are listed under each category.⁶ In this case, the

conspicuous place in the car, and shall not be removed or changed without authority from the Director.

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DC. Official Code § 47-2851.03 provides:

a) Endorsements to a basic business license shall be issued in the following license endorsement categories:

- (1) Repealed.
- (2) Educational Services;
- (3) Entertainment;
- (4) Environmental Materials;
- (5) Financial Services;
- (6) (A) Housing: Transient; and
(B) Housing: Residential;
- (7) Inspected Sales and Services;
- (8) Manufacturing;
- (9) Motor Vehicle Sales, Service, and Repair;
- (10) (A) Public Health: Health Care Facility;
(B) Public Health: Human Services Facility;
(C) Public Health: Child Health and Welfare;
(D) Public Health: Public Accommodations;
(E) Public Health: Pharmaceutical and Pharmacology;
(F) Public Health: Funeral Establishment;
(G) Public Health: Radioactive Materials;
(H) Public Health: Biohazard;
(I) Public Health: Food Establishment Wholesale; and

Government maintains that Respondent was required to have a business license with an “Inspected Sales and Service” license endorsement. D.C. Official Code § 47-2851.03a(h). This category covers diverse businesses that include ambulances, hearing aid dealers, pawnbrokers and taxicabs, as well as elevators.⁷

Thus, by issuing the Notices of Infraction in this case, the Government is in effect contending that Respondent is in the elevator business solely because it manages a building which has elevators to transport building occupants and guests to upper floors as an alternative to the stairs. Moreover, by requiring a separate business license for each elevator, it is contending that each elevator is a separate business establishment or business location.⁸

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- (J) Public Health: Food Establishment Retail;
 - (11) Public Safety;
 - (12) Employment Services;
 - (13) General Sales;
 - (14) General Services and Repair; and
 - (15) General Business.

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D.C. Official Code § 47-2851.03a(h) provides as follows:

(1) The following licenses are eliminated as separate license categories:

- (A) Ambulance;
- (B) Auctioneer;
- (C) Auctioning;
- (D) Elevators;
- (E) Hearing-aid dealer;
- (F) Horse Drawn Carriage Trade;
- (G) Pawnbrokers;
- (H) Pet shops;
- (I) Secondhand Dealers (A);
- (J) Secondhand Dealers (C);
- (K) Security Alarm Dealers; and
- (L) Taxicab.

(2) Businesses meeting the criteria established by law or regulation for the establishments listed in paragraph (1) of this subsection shall receive an Inspected Sales and Services license endorsement.

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Under the business licensing law, a license is required for each business location. D.C. Official Code § 47-2851.02 (b)

IV. Conclusions of Law

Respondent's plea of Admit with Explanation establishes that Respondent is technically liable for two violations of D.C. Official Code § 47-2851.02, which requires a basic business license to engage in a business requiring a license.⁹

However, I find that Respondent was not in violation of the cited statute because Respondent was not required to obtain business licenses for its elevators. I reach this conclusion for two principal reasons.

First, the interpretation advocated by the Government is contrary to the plain meaning of the relevant statutes. To claim that owning or managing a building with elevators is tantamount to engaging in the business of selling and servicing elevators is not consistent with the common meaning of these terms. *DCRA v W.H. Trice OAH* No. CR-I-05-N100422 (Final Order March 10, 2006) Under the theory advanced by the Government, Respondent would in effect be in the air conditioning business by virtue of operating a building with an air conditioning system and in

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Respondent had two principal contentions in this proceeding. The first was that the elevators were in a new building that had been inspected and approved when the building was built, and that the items cited by the Inspector relating to how the elevator was equipped had previously been approved. Respondent further maintained that it was unfair to require Respondent to pay \$8,000 to correct items previously approved. This contention relates to the conditions cited in the Notice of Violation and Notice to Abate that are not charged as violations in this proceeding. Accordingly, those claims are not relevant to the issue in this case.

Respondent's second contention is that the fine should be reduced or suspended because it paid a renewal fee but did not receive a license. Mr. Taylor testified that on or about June 2005, Respondent submitted a check for \$150 to the District of Columbia in payment for the license renewal fee. Mr. Taylor Respondent further testified that although the check was cashed, the license was not issued. Neither a copy of the check or other documentation was presented. In view of my conclusion that the business licensing law is inapplicable, it is not necessary to address Respondent's claim.

the plumbing business by virtue of operating a building with bathrooms. Such a position is contrary to common usage and understanding.

Secondly, the construction advocated by the Government is not consistent with other statutory provisions. In the business licensing law, a business is defined as follows:

(1) (A) "Business" means any trade, profession, *or activity* which provides, or holds itself out to provide, goods or services to the general public or to any portion of the general public, for hire or compensation ...[Emphasis added]

Passengers pay no separate fee for use of the elevators at the building Respondent manages. Thus, the service of riding an elevator is not provided for hire or compensation. This distinguishes it from all the other businesses in the "Inspected Sales and Service" endorsement category which include ambulances, hearing aid dealers, pawnbrokers and taxicabs, all of which normally impose a charge or require a fee for the goods or services that are provided.¹⁰

Consequently, like two of my colleagues who have addressed this issue, I must conclude that only businesses such as elevator dealerships or contractors, which sell and service elevators, are required to have a basic business license with an inspected sales and service license endorsement and that entities that simply own or manage a building with elevators are not required to have such licenses. *See DCRA v W.H. Trice OAH* No. CR-I-05-N100422 (Final Order March 10, 2006) (Judge Burnett) and *DCRA v Washington Court Hotel OAH* No. CR-I-06-N100443 (Final Order September 12, 2006) (Judge Harvey)

While elevator safety is of paramount importance, enforcing inapplicable provisions is not the way to advance that objective. There are numerous provisions that the Government can rely on to ensure that elevators are properly installed and are safely maintained. The Government's inspectors may inspect elevators without advance notice, take elevators out of service for failing to comply with

¹⁰ In addition, Section § 47-2851.03(a)(q) eliminated licenses for elevator operators. The repeal of this provision undercuts the Government's contention that operation of an elevator requires a license.

an order requiring repairs, and may seal an elevator to prevent operation pending repairs or inspection.¹¹ See generally *Washington Court Hotel, supra*. In addition, regulations in the elevator code require that building owners and operators pay an annual inspection fee for a certificate of operation and prohibit the operation of any elevator that has not been granted such a certificate. Operating an elevator without an up-to date-certificate is unlawful and each day of unlawful operation is a separate offense punishable by fines and penalties. 13A DCMR 107.2 and 3.

However, Respondent in this case was not charged with violating any of these provisions. Since the Respondent does not sell or service elevators it does not need an Inspected Sales and Service endorsement and therefore did not violate D.C. Official Code § 47-2851.02 by operating elevators without a business license. Respondent thus has a complete defense to the violations and I will therefore suspend any fines that would otherwise apply to these violations. *DOH v. Barbara Ann's Child Development Center*, I-03-42075 at 7, Lexis 17* (Final Order, April 12, 2004) (respondent pled admit with explanation, but the fine was suspended because of uncontested proof establishing a complete defense to the alleged violation.)

IV. Order

Based upon the foregoing findings of fact and conclusions of law, and the entire record in this matter, it is, hereby, this 20th day of November, 2006:

ORDERED, that any fines for Respondent's alleged violations of D.C. Official Code § 47-2851.02 shall be and are **SUSPENDED**; and it is further

¹¹ 13A DCMR 106.1 and 106.2; 13A DCMR 107.2 and 107.3; and 13A DCMR 108.

ORDERED, that the appeal rights of any person aggrieved by this Order are stated below.

November 20, 2006

/s/ _____
Mary Masulla
Administrative Law Judge